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ALEXANDER L. STEVAS

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No. 84-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.

Petitioner,

v.

MARY P. LAFFEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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The plaintiffs concede that the "facts of this case are as set forth in the district court's extensive findings." Opp. at 1. Nevertheless, they ask this Court, in contravention of principles laid down in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), to go behind the trial judge's findings and to examine the trial evidence in order to draw inferences that the trial judge never drew. Northwest, on the other hand, is relying only on the actual findings by the trial judge. The legal issues that flow from those *findings* are worthy of this Court's attention.

I. THE RELEVANCE OF INTENT

1. **Waiver.** Plaintiffs assert that Northwest "waived" the argument that it did not intend to discriminate on the basis of sex in establishing the pay differential, because that position is an "affirmative defense" that the Company did not formally plead. The court of appeals, however, refused to rely on this objection, and with good reason. This case was one of the first major Equal Pay Act litigations, and it actually went to trial before a detailed body of substantive and procedural law had developed. Thus, although plaintiffs rely on *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), as establishing that the Equal Pay Act defenses are "affirmative defenses," that case was decided five years after Northwest answered the complaint and three years after trial.

Moreover, the pleading question is irrelevant, since Northwest's intent in paying different wages to pursers and stewardesses was always an issue. In their complaint, plaintiffs alleged that Northwest discriminated "solely upon sex" in violation of the Equal Pay Act in paying pursers more than stewardesses and "intentionally" discriminated against women "because of their sex with respect to the compensation they receive." *Laffey I* J.A. 19, 20, 22. Northwest denied those allegations. The question whether the differential was motivated by sex or by a determination that the jobs were different was a litigated issue. After trial, plaintiffs argued that the "evidence

makes clear that the unifying factor which has determined the higher salary of pursers" was "that the Company's pursers have all . . . been men" (Pl. Post-trial Br. at 38), but the trial judge refused to find that the "unifying factor" underlying the pay differential was sex. Since the trial judge actually made the necessary findings relevant to the issue of intent, it is irrelevant now which party had what burdens of pleading and proof. *See* Fed. R. Civ. P. 15(b).

2. **Findings Concerning Intent.** Plaintiffs invite this Court to fall into the same trap as did the court of appeals: they conflate the distinct questions involved in the claim of *promotion* discrimination with those relevant to the equal pay claim, and thereby seek to create a legal presumption about Northwest's reasons for paying pursers and basic cabin attendants differently. At most, Northwest's promotional policy could be considered evidence that the trier of fact could evaluate in deciding whether the pay differential was motivated by sex. *See, e.g., Taylor v. Charley Bros. Co.*, 25 FEP Cases 602 (W.D. Pa. 1981). Here, however, far from drawing an inference of discriminatory motive, the trial judge linked the pay differential to Northwest's specific assessment that the jobs themselves were different and merited different pay, an assessment that we contend is a "factor other than sex." Petition at 6-7, 14-15.

The judge correctly recognized the legal distinction between plaintiffs' promotion claim and their equal pay claim. *Compare* Conclusions of Law 3 & 4 *with* 5(a) (App. 217a). Plaintiffs urged the trial judge to find that Northwest had intentionally discriminated both in setting the wage scales and in limiting promotional opportunities. In connection with plaintiffs' *promotion* claim, the court specifically found that Northwest "desire[d] to confine the purser position to males," in violation of Title VII. App. 181a-183a. There were no similar findings, however, indicating that the wage scales themselves were motivated by a desire to pay men more than women; indeed, such a finding would have been virtually impossible to reconcile with the judge's explicit finding that, at "all times from

1949 to the present, [male] FSA's and stewards have been compensated at the same rate as stewardesses of equal longevity." App. 169a.[1] The findings upon which plaintiffs now seek to rely (Opp. at 11) involve solely the trial judge's assessments of the differences and similarities between the jobs. They do not purport to resolve the issue of Northwest's intent in reaching a contrary assessment.[2]

Plaintiffs ask the Court to ignore the trial judge's finding that Northwest had honestly "believed" that the jobs were different, App. 220a, because he made the finding in explaining why he was not awarding liquidated damages. That contention is puzzling, to say the least, because the issue before the judge was, as plaintiffs acknowledge, the nature of Northwest's "belief in the existence of [job] differences." Opp. at 13. Thus, the finding on that question goes to the very heart of Northwest's motivation in paying different salaries for the two jobs. On remand, the trial judge again found as a matter of fact that Northwest management had "concluded that the jobs of purser and

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[1] Plaintiffs also downplay the number of basic cabin attendants who were men and received the same pay as women. Although their numbers varied over the period 1949-1976, hundreds of men served as basic cabin attendants and received the same salary as women in that job. App. 167a-169a.

[2] Plaintiffs seem to suggest that Northwest's assessment that the purser job entailed significantly greater responsibilities was bogus. They emphasize that Northwest's Cabin Service Manual did not use the word "supervisor" in referring to pursers. Opp. at 5. This is a semantic ploy, since as the trial judge found the job definition in every collective bargaining agreement over 25 years provided that pursers "may be designated as being *in charge of* other cabin attendants," App. 166a, and the Cabin Service Manual actually established a chain of command in which pursers were always in charge of basic cabin attendants, male or female, App. 208a. During the 1964 contract negotiations—one year after enactment of the Equal Pay Act—plaintiffs' union requested a review of the contractual definition of the purser position. After that review, the union negotiators who presented a proposed pact to the membership described it as providing a "more accurate description of a flight purser's responsibilities." *Laffey I* J.A. 2563. That "more accurate definition" carried forward the unique reference to pursers' supervisory status.

stewardess were *in fact* different." App. 253a (original emphasis).

The snippets that plaintiffs have selected from the record do not contradict the district court's basic findings that Northwest officials actually assessed the jobs and genuinely concluded that pursers were performing a different job meriting higher pay. In the absence of any findings supporting their position, plaintiffs simply quote the district court's *conclusion of law*, which does no more than track the words of the statute and cursorily conclude that Northwest's wage scale "discriminated on the basis of sex. . . ." App. 217a. The issue now, however, is whether, in light of *County of Washington v. Gunther*, 452 U.S. 161 (1982), that legal conclusion can stand in the face of the facts as found.

Plaintiffs next fall back on statements by the court of appeals in *Laffey I* that *it* drew a "reasonable inference"—even though the trial court had not—that "maleness" was the reason for the pay differential. App. 96a. As this Court has clearly established, however, appellate courts may not arrogate to themselves the fact-finding responsibility of the trial courts. Discriminatory intent

> "is a finding of fact to be made by the trial court . . . [and] means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." *Pullman-Standard v. Swint*, *supra*, 456 U.S. at 289-90.

This Court, therefore, must look to the trial court's findings, which show that Northwest did not intend to pay pursers less than basic cabin attendants because pursers were men.

Plaintiffs ultimately are left with one passing remark by the trial judge during an oral argument. In context, the remark only referred to Northwest's promotional policy, not the Company's motivation in establishing the pay differential. Moreover, at that same hearing plaintiffs' counsel had conceded that the judge had found the pay differential to be motivated by a factor other than sex:

> "Your Honor found reasonable grounds because your Honor believed, and obviously still believes, that *they sincerely thought that as a matter of fact these jobs were different*; that that was a sincere belief on their part and it was a real belief on their part that there was a difference in fact between these jobs." R. 69 at 40 (emphasis added).

Indeed, in the very passage quoted by plaintiffs here (Opp. at 14), their counsel conceded that the judge had found that Northwest "didn't deliberately intend to violate the Equal Pay Act." The trial judge concurred with these acknowledgements, but concluded that, in his view, his finding of non-discriminatory motive was irrelevant to the issue of liability: "what all of them thought doesn't keep it from being illegal." *Id.* at 105. Under *Gunther*, though, this conclusion was wrong as a matter of law.

3. **The Meaning of *Gunther*.** Plaintiffs merely quote the view of the court in *Laffey III* that, under *Gunther*, actual intent to discriminate against women in setting wage rates is not required when there was an intent to exclude women from promotional opportunities and there is a judicial determination that the higher rated job is substantially equal to the lower paid one. But whether the court of appeals correctly interpreted the elements of an equal pay claim under *Gunther* is precisely the legal issue presented by the petition.

4. **Significance of "Mistake of Fact."** Plaintiffs erroneously assert that a "mistake of fact" about job content cannot be a "factor other than sex" that excuses a wage differential. An employer's good faith assessment of job content, however, is the kind of job-related factor mentioned in the legislative history quoted by plaintiffs (Opp. at 17). All of those factors involve a "mistake of fact" since they are all defenses to—and thus presuppose—a finding that the jobs are *legally* equal. In each case, the employer is nevertheless deemed not to have discriminated on the basis of sex if he relied, mistakenly in a court's view, on its assessment that a job-related factor—such as "lifting or moving" or "hours of work"—made one job different from

another, or one employee more valuable than another. For example, the court of appeals and the plaintiffs recognize that a "job evaluation system" is a "factor other than sex." But reliance on a job evaluation as an affirmative defense presupposes that a court has found that the jobs are legally equal; thus, by definition, the system was "mistaken" in rating them as different. Northwest's allegedly mistaken assessment of the job differences, therefore, is legally indistinguishable from the other kinds of "factors other than sex" that plaintiffs admit are sufficient.

The supposed distinction between "objective" and "subjective" factors drawn by the court of appeals is an artificial construct. In concluding that the jobs were different, Northwest relied on factors such as the differences in defined responsibilities of the jobs, the differing rates negotiated by a single union as appropriate for pursers and basic cabin attendants, and the Company's actual internal assessment of job content.[3] These are just as "objective" as the other factors listed in the legislative history, such as "differences based on experience." Of course, in any situation the employer must make an assessment whether jobs with some degree of similarity merit different pay. That assessment is "subjective" in the sense that it requires the exercise of judgment, but as this Court ruled in *Corning Glass*, even if a court later concludes that the employer's assessment was wrong, the court cannot second-guess him based on its own "objective" view. It is enough under the Equal Pay Act's fourth defense if the employer's decision actually was based on his assessment of job-related factors that, in the employer's *bona fide* judgment, distinguish the jobs.

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[3] Plaintiffs misstate the record when they assert that the differential was not established in collective bargaining. Opp. at 8 n.10. The district court found: "The compensation for all cabin attendants is established through collective bargaining." App. 215a; *see also* App. 166a-167a. That differential was maintained and even widened during 25 years of collective bargaining with unions in which "females always have and still do possess a clear numerical superiority. . . ." App. 165a.

5. **Conflict in the Circuits.** Finally, plaintiffs argue that there is no circuit conflict because the Fifth and Tenth Circuit cases cited by Northwest involve "objective" factors other than sex, not "subjective" "mistakes of fact." But the "objective"/"subjective" distinction is nowhere to be found in those cases. Those cases expressly view motive as the crucial consideration, while the D.C. Circuit and the Ninth Circuit view motive as irrelevant. Plaintiffs, moreover, do not deny that the commentators unanimously have interpreted *Gunther* to mean that discriminatory intent is the ultimate issue in equal pay cases. *See* Petition at 12 n.2.

II. MEASURE OF BACKPAY UNDER TITLE VII

Northwest's original position was that, as a matter of discretion, no backpay at all should be awarded in this case. The district court rejected that position, but in its 1974 order expressly left to a subsequent stage of the litigation the actual determination of the class members' entitlements to backpay. App. 232a. After the remand following *Laffey I*, the remedial phase of the litigation began. Promptly at that stage, and within a few months after this Court decided *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), Northwest raised the measure-of-backpay issue. Under *Manhart* and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the courts below had a duty at least to consider Northwest's equitable proposal for crafting a "make-whole-but-not-more-than-whole" remedy. This they refused to do.

Northwest tendered evidence in support of its Title VII backpay argument more than four years before the district court actually made specific backpay awards in 1982. During that period the parties undertook substantial discovery and made a voluminous evidentiary record in connection with a host of other remedial issues, such as liquidated damages, weight-related terminations and suspensions, pre-judgment interest, and class membership. Thus, the plaintiffs had ample opportunity to test Northwest's evidence; indeed, Northwest invited an evidentiary

hearing in 1978 for that very purpose, but plaintiffs and the district court declined. Plaintiffs have no basis, therefore, for claiming that they were "in fact prejudiced" by the timing of this issue. *Albemarle*, 422 U.S. at 424.

Finally, although plaintiffs now contend that the district court exercised discretion in setting the Title VII backpay formula, they persuaded both courts below to hold that Northwest's view of the proper measure of damages under Title VII was erroneous as a matter of law. The district court stated unequivocally that Title VII *requires* the same backpay formula as the Equal Pay Act when an employer's conduct gives rise to claims under both statutes, and the court of appeals affirmed. App. 248a, 30a-33a; *see also* App. 239a, 133a. Since the courts rejected Northwest's position on the merits, and since this Court in *Gunther* recognized in the interim that the statutes have different remedial schemes and backpay remedies, *see* 452 U.S. at 175 n.14, there is no genuine issue of "waiver" here.

III. PROPER TEST FOR "WILLFUL VIOLATION"

Plaintiffs argue that the interpretation of "willful violation" at issue here has no relationship to the interpretation of the same term in *TWA v. Thurston*, No. 83-997. They base that assertion on the dubious but irrelevant proposition that § 255 of the FLSA, governing entitlement to a third year of backpay, is "compensatory," while § 626(b) of the ADEA governing liquidated damages is "punitive." Opp. at 26. The real point, however, is that § 626(e)(1) of the ADEA expressly incorporates § 255 of the FLSA to govern the backpay period under the ADEA, and all parties in *Thurston* recognize that the term "willful violation" must mean the same thing in both sections of the ADEA. In turn, the incorporated FLSA provision must have the same meaning as the ADEA provisions. Thus, as explained in our petition (at 20-22), these three statutory provisions are inextricably intertwined.

Plaintiffs also deny that there is a conflict among the circuits, even though *Laffey I* itself recognized that dif-

ferent circuits have adopted different formulations of the test, and even though the Sixth Circuit—contrary to plaintiffs' suggestion (Opp. at 24 n.21)—continues to apply a higher standard. *E.g., Donovan v. KFC National Management Co.*, 682 F.2d 603 (6th Cir. 1982); *Marshall v. Root's Restaurant, Inc.*, 667 F.2d 559 (6th Cir. 1982). Moreover, plaintiffs parse only cases decided under § 255 of the FLSA. Undeniably, however, the courts of appeals in cases arising under the ADEA have adopted inconsistent interpretations of the term "willful violation" as used in both the backpay period and liquidated damages provisions, and some circuits have specifically adopted the "intentional violation" standard advocated by Northwest in this case. Petition at 20-21. Thus, there is an undisputed conflict over the standard for "willful violation" between the cases cited by plaintiffs under § 255 of the FLSA, and cases under the ADEA interpreting the same term in a context in which Congress must have intended it to have the same meaning. There is surely enough confusion about this pervasively important issue to warrant definitive treatment in this case.[4]

IV. STANDARD FOR "LIQUIDATED DAMAGES"

Plaintiffs do not deny that, in conflict with every other court that has addressed these factors, the court below ruled that traditional company practice, general industry practice, collective bargaining, and employee acquiescence

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[4] Plaintiffs argue that *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1978), sets forth the "accepted formula" for determining willfulness under the FLSA. Opp. at 23 n.21. Yet, they ignore the fact that *Jiffy June* was a complete departure from all previous decisions under § 255, which had adopted a "conscious violation" standard, and that a Fifth Circuit panel recently concluded that *Jiffy June* had been wrongly decided. *Hill v. J.C. Penny Co.*, 688 F.2d 370, 376 (5th Cir. 1982) (concurring opinion of Gee & Clark, JJ.). Plaintiffs' also ignore, as did the court below, the only scholarly analysis of the legislative history of § 255, which reached the same conclusion as did Judges Gee and Clark. *See, e.g.*, Note, *Standards of Willfulness Under the Fair Labor Standards Act*, 28 Mich. L. Rev. 626 (1980).

are legally irrelevant to determining whether an employer had "reasonable grounds" for believing that his employment practice "was not in violation" of the law, 29 U.S.C. § 260. Opp. at 28. *See* Petition at 24. Instead, they try to sidestep that issue by arguing that this ruling did not infect the evaluation of Northwest's "good faith," a separate requirement for remitting liquidated damages. Opp. at 29. In fact, however, the lower courts improperly treated those factors as legally irrelevant to either question.

On remand following *Laffey I*, the district judge expressly concluded that the court of appeals had precluded him from considering those four factors in evaluating *either* the reasonableness *or* the good faith of Northwest's belief that its actions were lawful: "The Court of Appeals found that the factors relied on by this Court to support the finding of good faith were inadequate...." App. 252a. Once the district judge concluded that he could not consider Northwest's reliance on these factors in making his assessment, the judge found that the *other* evidence of good faith proffered by Northwest was, standing alone, insufficient to carry the very heavy burden placed on employers by *Laffey I*. Then, in *Laffey III*, the court of appeals approved the district court's approach. App. 46a-51a. Thus, the exclusion of the four factors artificially narrowed the trial judge's inquiry on the "good faith" issue and impermissibly tainted his conclusion. Accordingly, the adverse ruling on "good faith," which was made on remand within the strictures erroneously imposed by *Laffey I*, is hardly an independent obstacle to review.

Respectfully submitted,

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